Ross Furniture Corporation t/a A. D. Ross Company and Furniture Workers of Horsham & Vicinity, Petitioner. Case 4–RC–10046

July 24, 1973

DECISION ON REVIEW AND DIRECTION OF ELECTION

By Chairman Miller and Members Fanning and Penello

On February 22, 1973, the Regional Director issued a Decision and Order dismissing the petition in the above-entitled proceeding on the ground that it was barred by the existing contract between the Employer and Truck Drivers, Chauffeurs and Helpers Local Union No. 384, affiliated with Teamsters, Chauffeurs, Warehousemen and Helpers of America. Thereafter, Petitioner filed a timely request for review, contending that the Regional Director erred in finding the contract to be a bar.

On March 22, 1973, the National Labor Relations Board, by telegraphic order, granted the request for review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record with respect to the issues under review and makes the following findings:

The Employer, which is engaged in the retail sale of furniture and appliances, maintains several retail outlets in the Philadelphia, Pennsylvania, area and a warehouse at Horsham, Pennsylvania, from which it makes deliveries to customers. By its petition filed October 31, 1972, the Petitioner seeks a unit of truckdrivers, helpers, and warehousemen employed at the Horsham warehouse.² As stated above, the Regional Director concluded, in accord with the contention of the Employer and Local 384, that a contract executed by them on October 24, 1972, is a bar to the instant petition. We disagree.

In May 1972, the Employer subcontracted its delivery operation on a trial basis to another firm. At the time that the Employer terminated its drivers and helpers, they were immediately employed by the sub-

¹ Hereinafter called Local 384. Local 384 was permitted to intervene in this proceeding on the basis of its contract discussed below. In addition, Teamsters Local 115 (hereinafter Local 115) was permitted to intervene herein on the basis of a showing of interest.

² The Regional Director found that the unit sought was appropriate. No

contractor and then became members of Local 384, which had historically represented the employees of the subcontractor.

In August 1972, the Employer terminated its relationship with the subcontractor and recommenced its own delivery operation, reemploying its former drivers and helpers. At the same time, the Employer recognized Local 384 as the representative of its drivers, helpers, and warehousemen, subject to the condition that the drivers and helpers be given no immediate wage increase, and commenced negotiations which ultimately culminated in a tentative unsigned agreement in October. Although not required to do so, Local 384 President Pascale met with the employees on October 22 to seek their ratification of the agreement. The drivers and helpers refused to ratify the agreement because of their dissatisfaction with the wage structure 3 and, according to one driver or helper, they were told by Pascale that he was not going to seek further changes and that they could get another union.

The next day—October 23—the Employer terminated all its drivers and helpers with the intention of again retaining an independent delivery service but retained its warehousemen. At a meeting held that evening, the drivers and helpers formed the Petitioner herein as a means of obtaining reemployment and wage increases. On October 24, the drivers and helpers commenced picketing the Employer's premises. Later, on the same day, Pascale and the Employer's representative executed the previously negotiated collective-bargaining agreement retroactive to August 22, 1972, the day the Employer agreed to recognize Local 384.4 However, in doing so, the parties thereto deleted all references to the drivers and helpers except the reference to them in the contract's recognition clause. In explaining the reason for the above-mentioned deletion, the Employer's labor consultant testified that "the drivers and helpers were laid off—and we would get to the question of [their] rates of pay, and so forth, upon their return to work." Pascale, who knew at the time he executed the contract containing a no-strike clause that the drivers and helpers were on strike, testified the reason for doing so was to insure that the warehousemen "would be fully covered and fully represented until the settlement of the drivers and helpers was straightened out. . . . " He further testified that on the day he executed the agreement he did not represent the drivers and helpers and that at that time he did not have any discussion with the Employer with respect to the fact that the drivers and helpers were not working. It further appears that Pas-

² The Regional Director found that the unit sought was appropriate No review was sought as to this conclusion. At the time of the hearing, there were approximately 17 employees in this unit, 12 were drivers and helpers and the remaining were warehousemen

³ The wage provisions provided no immediate increase of the then current

⁴ The terminal date of the contract is August 22, 1975

cale made no attempt to talk to the striking drivers and helpers until October 30 when they agreed, in settlement of an injunction proceeding in a state court, to return to work pending a resolution by the Board as to whether the contract precluded the involved employees from having an election.⁵ The following day the instant petition was filed. No overt action was ever taken to add the deleted portions pertaining to the drivers and helpers to the contract.⁶

On these facts, we are unable to conclude that the involved contract constitutes a bar to the instant petition. The contract was executed at a time when the drivers and helpers, constituting the bulk of the unit employees, had been separated from the payroll and were engaging in concerted activity, independent of the contracting union, designed to secure their reemployment and to obtain a wage rate higher than that specified in the contract. At this point in time, the contracting parties recognized that fact, but did not purport to resolve this basic labor dispute in the contract they were about to execute. Instead, they executed the contract for the benefit of the warehousemen

and physically deleted all references in the contract, except in the recognition clause, to the drivers and helpers, deferring further bargaining as to wage rates for the drivers and helpers until such time as it could be determined when and if these employees would return to work. In these circumstances, we, unlike the Regional Director, are unable to give controlling weight to the fact that the driver and helper classifications were not excised from the recognition clause and that the separated employees in those classifications later returned to work pursuant to the settlement agreement, which left the basic dispute unresolved. On the contrary, the record as a whole convinces us that the parties did not intend to stabilize the working conditions of the drivers and helpers in the executed contract, nor did it have that legal effect. Accordingly, we find the contract is not a bar and we shall direct an election in the following unit which, in accord with the Regional Director, we find appropriate:

All drivers, helpers, and warehousemen at the Employer's Horsham, Pennsylvania, warehouse operation, excluding office clerical employees, guards, and supervisors as defined in the Act. [Direction of Election and Excelsior footnote omitted from publication.]

The Employer commenced the state court action on October 25 against the drivers and helpers individually Local 384 was not a defendant in that proceeding
 We see no basis in law or fact for the Employer's contention that the

We see no basis in law or fact for the Employer's contention that the deleted provisions were automatically operative when the drivers and helpers returned to work

⁷ See Appalachian Shale Products Co, 121 NLRB 1160, 1163.